United Nations CAT/C/53/D/495/2012

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Distr.: General
19 January 2015

Original: English

Committee against Torture

Communication No. 495/2012

Decision adopted by the Committee at its fifty-third session, 3–28 November 2014

Submitted by:	N.Z. (represented by counsel, Anastasia Miller)
Alleged victim:	The complainant's son, E.Z.
State party:	Kazakhstan
Date of complaint:	14 July 2011 (initial submission)
Date of present decision:	28 November 2014
Subject matter:	Allegations of torture during pretrial detention, ill-treatment in prison and inadequate investigation
Procedural issues:	Admissibility *ratione temporis*
Substantive issues:	Torture, effective investigation
Articles of the Convention:	1, 12, 13, 22

GE.15-00602 (E)

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Annex

Decision of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (fifty-third session)

concerning

Communication No. 495/2012

Submitted by:	N.Z. (represented by counsel, Anastasia Miller)
Alleged victim:	The complainant's son, E.Z.
State party:	Kazakhstan
Date of complaint:	14 July 2011 (initial submission)

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 28 November 2014,

Having concluded its consideration of complaint No. 495/2012, submitted to the Committee against Torture by N.Z. under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the complainant, her counsel and the State party,

Adopts the following:

Decision under article 22, paragraph 7, of the Convention against Torture

1. The complainant is N.Z., a Kazakhstan national born on 3 December 1952, who submitted the communication on behalf of her son, E.Z., a Kazakhstan national born on 19 June 1986. The complainant claims that her son is a victim of violations by the State party of articles 1, 12 and 13 of the Convention.[1] The complainant is represented by counsel.

The facts as presented by the complainant

2.1 On 15 September 2006, the complainant's son and a friend of his, Mr. M., were planning a hunting trip. They had a hunting licence, a shotgun and a bag with bullets and cases with them in Mr. M.'s car. During the trip, the complainant's son unwillingly participated in a conflict that broke out between Mr. M. and three of their acquaintances. During the conflict, the complainant's son fired a shotgun into the air. A police chase

[1] On 21 February 2008, Kazakhstan made a declaration under article 22 of the Convention against Torture recognizing the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to the jurisdiction of Kazakhstan who claim to be victims of a violation by the State party of the provisions of the Convention.

ensued, and a police officer, Mr. N., was injured as he was trying to stop the car. The complainant's son and his friend, Mr. M., drove away.

2.2 The complainant submits that, on 16 September 2006, her son voluntarily went to a police station to inform the police about the incident. When he entered the police station, police officers started beating him. Shortly after the beating, the complainant's son was taken to a doctor for examination. The doctor examined him and found no injuries.

2.3 The complainant claims that the beating of her son continued when he was brought back to the police station. One of the police officers broke her son's nose; another police officer knocked him down and started beating him with a rubber truncheon, aiming at his liver and kidneys. Police officers verbally insulted the complainant's son and demanded that he admit attacking Mr. N.

2.4 The complainant claims that her son was held at the police station until about 4 p.m. on 16 September 2006. At that time, the complainant's son was taken to a hospital. The complainant claims that the doctor on duty did not conduct a thorough examination of her son and found no injuries. The complainant's son was released from police custody that evening.

2.5 Between 16 September 2006 and 18 September 2006, the complainant's son went to several doctors, both in his district and in the Kostanay regional centre. Doctors concluded that the complainant's son had injuries to his back, forearms, hips, ear and nose.[2] On 30 October 2006, the complainant's son was officially charged with hooliganism while using a firearm. On 11 November 2006, he was also charged with illegal possession of a firearm. On 14 November 2006, he was further charged with using violence against a government representative. On 14 November 2006, the complainant's son was arrested and detained on remand pending trial.

2.6 The complainant contends that during the ensuing several months of detention the ill-treatment of her son continued. At various times, the complainant's son lacked food, water and basic sanitary supplies. The complainant also submits that her son was beaten on a daily basis by his cellmates and that those beatings were authorized by the authorities of the detention facility.

2.7 On 2 April 2007, the complainant's son was convicted of several crimes, including hooliganism, illegal possession of firearms and committing violence against a representative of a law enforcement body, and sentenced to seven years of imprisonment.

2.8 The complainant contends that her son has exhausted all available and effective domestic remedies. She claims that her son, either in person or through counsel, complained about the torture and ill-treatment he had experienced, both during the initial court hearings and throughout the appeal procedure. The complainant submits that on 19 May 2008, the Supreme Court of Kazakhstan rejected her son's request for a supervisory review.

The complaint

3.1 The complainant maintains that the beatings and ill-treatment of her son during his initial detention on 16 September 2006 and during his detention pending trial, and the

[2] The complainant submitted a copy of a report of a medical expert, dated 21 September 2006, stating that during an examination that took place on 18 September 2006, her son had a fractured nose and numerous bruises on his right ear, his face, his left shoulder, both thighs and all over the body, which resulted in a temporary health disturbance that would last no more than 21 days.

subsequent failure to investigate his allegations of torture amounted to violations by Kazakhstan of articles 12 and 13 of the Convention.

3.2 The complainant submits that the violations against her son occurred in 2006. While Kazakhstan made its declaration under article 22 of the Convention only on 21 February 2008, the complainant argues that the violations of her son's rights continued after 21 February 2008 and that the violations led to results that are violations of the Convention per se.

3.3 The complainant claims that by failing to conduct an effective investigation into claims of torture, the State party has continued to violate her son's rights after the declaration under article 22 of the Convention was made by Kazakhstan. She contends that the State party has an obligation to investigate allegations of torture and, in cases where it is necessary, to provide remedies both to the victims of violations and to members of their families.

3.4 The complainant also claims that her son continues to suffer from health problems resulting from the physical injuries he received as a direct result of torture. She claims that this is further evidence that the violation of the Convention by the State party continues.

State party's observations on admissibility and merits

4.1 On 5 June 2012, the State party submitted that, on 2 April 2007, the complainant's son had been convicted under article 251, paragraph 4, article 257, paragraph 2 (a) and (b), article 321, paragraph 2, and article 58, paragraph 3, of the Criminal Code and sentenced to seven years of imprisonment. The State party reiterates the content of the verdict.[3] On 15 May 2007, the Kostanay Regional Court confirmed the verdict upon appeal. On 7 August 2007, the Supreme Court rejected the supervisory review request filed by the lawyer of the complainant's son. The Office of the Prosecutor-General on several occasions reviewed the complaints of E.Z. regarding the illegality of the verdict against him and regarding the use of unlawful means of investigation. The investigation of the claims showed that the guilt of the accused had been proven by the entirety of the evidence presented at the court hearings and in particular by the testimonies of the victims. The medical examination of E.Z. showed that at the time of the incident he was intoxicated. During the court hearings the court interrogated police officers; from their testimonies, it could be concluded that at the time of his arrest, E.Z. already bore several injuries that he had sustained during the fight at a nightclub on 16 September 2006. The injuries were recorded and the medical expertise concluded that the injuries corresponded to the timing and the circumstances of the case. The court investigation also revealed that several relatives of the complainant's son were employed in the police station that investigated the case against him, including in the investigation department. The court concluded that the above excluded the possibility that officers of that police station had exercised violence against E.Z.

4.2 The State party maintains that no violations of the criminal procedure legislation that would lead to the revocation or amendment of the verdict had been detected. No grounds for initiating a supervisory review had been found. The State party also submits that at the

[3] According to the verdict, at 1 a.m. on 16 September 2006, the complainant's son and his friend, heavily intoxicated, got into a fight with several individuals in front of the Cultural Centre in the village of Kamensk-Uralsk. The complainant's son shot a hunting rifle into the air and attempted to knife one of his opponents. A local police officer came to the scene and attempted to confiscate the hunting weapon, but the complainant's son and his friend got into their vehicle and tried to drive away. The police officer attempted to stop them by getting into the vehicle and placing the gear stick in the neutral position. The complainant's son and his friend proceeded to beat the police officer until he lost consciousness and then drove away.

time of its submission there was no information regarding any complaints filed by the complainant's son, because in accordance with Order No. 28 of 21 January 2002 of the Ministry of Justice, all records regarding complaints of detainees in pretrial detention centres (SIZOs) are kept only for five years. Records regarding placements of inmates in cells are kept only for one year and therefore no records are available regarding with whom the complainant's son had been detained. The State party also submits that on an unspecified date, the Prosecutor's Office of Kostanay Region interrogated the management of the SIZO, but the latter stated that, since the event took place a long time ago, they no longer remembered the detainee, and denied that any physical or psychological pressure on detainees had taken place.

4.3 The State party further submits that, on 26 September 2006, the Department of Internal Affairs of Kostanay received from the Prosecutor's Office a complaint submitted by the lawyer of E.Z. regarding injuries inflicted on him by police officers. Following a verification, a senior investigator, on 23 November 2006, refused to initiate a criminal investigation, on the basis of article 37, paragraph 1 (2), of the Criminal Procedure Code. The ref ;al was revoked by a decision of the Prosecutor's Office of Kostanay of 20 December 2006 and a criminal investigation was initiated on charges against unknown perpetrators, under article 104, paragraph 1, of the Criminal Code. In the course of the investigation officers of the SIZO and medical personnel were questioned, but the investigation did not confirm the allegations of the complainant's son. Criminal charges were raised against one Mr. P., who admitted hitting Mr. M. Other witnesses also admitted hitting the complainant's son and Mr. M. However, Mr. P. died from a shotgun wound on 17 October 2006. On 30 May 2007 the criminal charges against Mr. P. were dropped and the investigation was discontinued. On 4 October 2007, the Prosecutor's Office declared the decision to discontinue the criminal investigation illegal, revoked it and redirected the case for additional investigation. The criminal investigation was discontinued again, on 28 December 2007, by a senior investigator, on the basis of article 50, paragraph 1 (1), of the Criminal Procedure Code. On 4 February 2008, the criminal investigation was reopened by an order of the Prosecutor's Office of Mendykara District. On 28 February 2008, the investigation was again discontinued on the basis of article 50, paragraph 1 (1), of the Criminal Procedure Code. On 11 March 2008, the Prosecutor's Office of Mendykara District confirmed the decision to discontinue the investigation.

4.4 Furthermore, the State party submits that on 26 February 2007, the complainant and the mother of Mr. M. filed a complaint with the Department of Internal Affairs regarding the beatings of their sons by officers of the Mendykara police station. On 14 March 2007, a senior investigator issued a decision to refuse to bring criminal charges against officers, on the basis of article 37, paragraph 1 (2), of the Criminal Procedure Code. The decision was confirmed by the Prosecutor's Office of Kostanay District by a decision of 24 March 2007. On 22 November 2007, the complainant filed another complaint regarding the beating of her son by officers of the Mendykara police station. On 25 November 2007, an investigator issued a decision to refuse to bring criminal charges against officers, on the basis of article 37, paragraph 1 (8), of the Criminal Procedure Code. That decision was confirmed by the Prosecutor's Office of Kostanay District in a decision of 5 December 2007.

Complainant's comments

5.1 On 14 August 2012, the complainant submitted that in its response, the State party mainly repeated information as set forth in the case file on the criminal charges against and conviction of her son. She points out that the submission confirms that in the course of the investigation of her son's allegations of torture while in police detention, only police officers had been questioned. She maintains that therefore the investigation does not meet the criterion of "adequacy/accuracy". She submits that an investigation must be effective and all steps necessary should be taken "to uncover the facts and circumstances of the

alleged acts". Moreover, the investigation "did not meet the criteria of independence and impartiality", since although, according to the norms of national legislation, the Prosecutor's Office had the authority to look into torture complaints, all complaints lodged by her son, by his lawyer and by her were returned to the office of internal investigation of the police. She further notes that the State party argues that the injuries of her son were sustained during a fight on 16 September 2006. She maintains that at about 3 a.m. on 16 September 2006 her son and Mr. M. were taken to a hospital, where the doctors failed to document their injuries. Only when her son's condition deteriorated and his relatives brought him to the emergency room of the Mendykara Central District Hospital were his injuries documented, by the doctor on duty.

5.2 The complainant also notes the State party's submission that the complaints regarding torture that her son had filed while in detention had been destroyed because, in accordance with Ministry of Justice Order No. 28 of 21 January 2002, the storage period for logs of complaints and appeals was five years, and the storage period for information regarding placements in cells of persons in custody was one year. The complainant refers to the Human Rights Committee's jurisprudence that if a complainant provides detailed information about an instance of torture the State party is expected to properly investigate the allegations.[4] She also refers to the Human Rights Committee's findings that the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to relevant information to the case. In cases where the alleged violations are confirmed by the evidence provided by the author, and where further clarification of the case depends on information exclusively in the hands of the State concerned, the Committee, in the absence of satisfactory evidence and explanations to the contrary submitted by the State, may find the author's allegations to be substantiated.[5] She maintains that the State party should provide specific answers and evidence related to the allegations, and that a denial of a general nature is not sufficient.[6] The complainant maintains that in the absence of information on measures taken by the State party for a thorough, timely and effective investigation of the torture allegations concerning her son the Committee should consider the admissibility of the communication together with the merits of the communication and recognize violations by Kazakhstan of articles 1, 12, 13 of the Convention.

State party's further submission

6. On 11 January 2013, the State party submitted that, according to the Office of the Prosecutor-General, the allegations of torture committed by police officers against the complainant's son had been "disproved", that the State party had not violated the Convention against Torture and that the communication should be declared inadmissible.

Complainant's comments

7. On 6 March 2013, the complainant submitted that she maintained her earlier submissions and that, in the absence of information on measures taken by the State for a thorough, timely and effective investigation of the torture allegations concerning her son

[4] The complainant refers to Human Rights Committee communication No. 8/1977, *Weismann de Lanza and Lanza Perdomo* v. *Uruguay*, Views adopted on 3 April 1980.

[5] The complainant refers to the Human Rights Committee's jurisprudence in communications No. 992/2001, *Bousroual* v. *Algeria*, Views adopted on 30 March 2006, No. 30/1978, *Bleier* v. *Uruguay*, Views adopted on 29 March 1982, para. 13.3 and No. 1756/2008, *Zhumbaeva* v. *Kyrgyzstan*, Views adopted on 19 July 2011.

[6] The complainant refers to *Weismann de Lanza and Lanza Perdomo* v. *Uruguay*.

she would like to ask that the statements contained in the communication be recognized as valid.

State party's observations on admissibility

8. On 19 June 2013, the State party submitted that the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment had come into force for Kazakhstan on 26 June 2008 and that the State party had recognized the competence of the Committee against Torture to review communications concerning facts that had taken place after that date. The State party submits that the alleged violations against the complainant's son took place before that date and therefore the communication should be considered inadmissible.

Complainant's comments

9. On 23 September 2013, the complainant submitted that with regard to the issue of the admissibility *ratione temporis*, she maintained her earlier arguments. She refers to the Committee's jurisprudence in *Gerasimov* v. *Kazakhstan*,[7] where the Committee found that it was not precluded from examining the case, because the State party's failure to fulfil its obligations to investigate the complainant's allegations and to provide him with redress continued after the State party recognized the Committee's competence under article 22 of the Convention. She maintains that the communication is admissible because, while the torture against her son took place in 2006, it still, after the declaration under article 22 of the Convention, has not been effectively and promptly investigated by the responsible Kazakh authorities, despite the complaints filed on her son's behalf with the request to investigate the torture and punish the perpetrators. She maintains that the failure to conduct an investigation is a continuing breach of the obligation to conduct a comprehensive investigation into the alleged torture. She further submits that her son continues to suffer from health problems as a result of the trauma experienced: in addition to hearing loss, he suffers from "regular headaches, heart pain and intermittent vomiting" and has had a heart attack.[8]

State party's further observations

10. On 27 December 2013, the State party reiterated that the communication should be declared inadmissible *ratione temporis* and that the allegations in it were unfounded.

Complainant's further comments

11. On 4 April 2014, the complainant submitted that the State party's submission did not contain any new arguments and that she supported her earlier submissions.

Issues and proceedings before the Committee

Consideration of admissibility

12.1 Before considering any claim contained in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that

[7] The complainant refers to communication No. 433/2010, *Gerasimov* v. *Kazakhstan*, decision adopted on 24 May 2012, para. 11.2.

[8] The complainant provided medical certificates as evidence of her son's continuing health issues, dated 30 September 2011, 18 and 19 January 2012 and 22 August 2013.

the same matter has not been and is not being examined under another procedure of international investigation or settlement.

12.2 The Committee notes the complainant's allegations that the rights of her son under article 1 of the Convention were violated, specifically, that during the pretrial detention he was subjected to ill-treatment, that on various occasions he was deprived of food, water and basic sanitary supplies, and that he was beaten on a daily basis by his cellmates and that those beatings were authorized by the authorities of the detention facility. The Committee, however, observes that the allegations relate to events that took place before the State party made a declaration under article 22 of the Convention and do not appear to have been raised at any point before the domestic authorities. In the circumstances, the Committee finds that the above claims are inadmissible *ratione temporis*.

12.3 The Committee notes that the State party contests the Committee's competence *ratione temporis* on grounds that the alleged torture occurred before Kazakhstan made the declaration under article 22 of the Convention. The Committee recalls that a State party's obligations under the Convention apply from the date of its entry into force for that State party. It can examine alleged violations of the Convention which occurred before a State party's recognition of the Committee's competence under article 22 if the effects of those violations continued after the declaration, and if the effects constitute in themselves a violation of the Convention. A continuing violation must be interpreted as an affirmation, after the formulation of the declaration, by act or by clear implication, of the previous violations of the State party.[9] The Committee notes that Kazakhstan made the declaration under article 22 of the Convention on 21 February 2008 and that article 22 does not specify any delay before a declaration made under said article would become effective. The Committee observes that even though the events complained of occurred before that date, the decision of the Prosecutor's Office of Kostanay to open a criminal investigation into the torture allegations was dated 20 December 2006, and that the above investigation, after being discontinued and reopened several times, lasted until 11 March 2008, when the Prosecutor's Office of Mendykara District confirmed the decision to discontinue it (see para. 4.3 above), that is, after Kazakhstan made the declaration under article 22 of the Convention. Therefore, the State party's alleged failure to fulfil its obligations to investigate the complainant's allegations and to provide her son with redress continued after the State party had recognized the Committee's competence under article 22 of the Convention. In the circumstances, the Committee is not precluded *ratione temporis* from considering the complainant's allegations regarding violations of her son's rights under articles 12 and 13 of the Convention.[10]

12.4 With reference to article 22, paragraph 4, of the Convention and rule 111 of the Committee's rules of procedure, the Committee finds no other obstacle to the admissibility of the communication and proceeds to its examination on the merits.

Consideration of the merits

13.1 The Committee has considered the communication in the light of all information made available to it by the parties concerned, in accordance with article 22, paragraph 4, of the Convention.

13.2 The complainant claims that no prompt, impartial and effective investigation has been carried out into the allegations of torture and that those responsible have not been prosecuted, in violation of articles 12 and 13 of the Convention. The Committee recalls that

[9] See communication No. 247/2004, *A.A.* v. *Azerbaijan*, decision of inadmissibility adopted on 25 November 2005, para. 6.4.

[10] See *Gerasimov* v. *Kazakhstan*, para. 11.2.

article 12 requires that the investigation should be prompt, impartial and effective, promptness being essential both to ensure that the victim cannot continue to be subjected to such acts and because, in general, unless the methods employed have permanent or serious effects, the physical traces of torture, and especially of cruel, inhuman or degrading treatment, soon disappear.[11]

13.3 The Committee recalls that an investigation in itself is not sufficient to demonstrate the State party's conformity with its obligations under article 12 of the Convention if it can be shown not to have been conducted impartially.[12] In that respect, it notes that the investigation was entrusted to the police department (the Department of Internal Security of the Department of Internal Affairs of Kostanay District) where the alleged torture was said to have been committed and thereafter to the hierarchically superior body (Department of Internal Security of the Mendykara Regional Department of Internal Affairs).

13.4 The Committee notes that the complainant reported the acts of torture within days after the events, that his lawyer filed a formal complaint on 26 September 2006, that a preliminary inquiry was initiated on an unspecified date and that it resulted in a refusal to open a criminal investigation, with a decision of an investigator on 23 November 2006. Thereafter, following the complainant's son's appeals, the investigation was repeatedly restarted and closed several times by different prosecutorial and investigative bodies. It resulted in the filing of charges against Mr. P., who passed away during the proceedings, and ultimately was closed with no criminal responsibility being attributed to police officers due to lack of evidence. The Committee notes that a medical examination of the complainant was conducted on 18 September 2006. It also notes that the investigation relied heavily on the testimony of the police officers, but that other participants in the events of 16 September 2006, as well as the medical personnel who first examined the alleged victims, had also been questioned.

13.5 While it remains concerned that that preliminary examinations of complaints of torture and ill-treatment by police officers are undertaken by the Department of Internal Security, which is under the same chain of command as the regular police force, the Committee observes that the investigation was followed by prosecutor's offices, which on several occasions revoked the decisions of the investigators to close the investigation and returned the case for additional investigation. In the particular circumstances of this case, the Committee finds that the complainant has failed to substantiate that the investigation conducted into the torture allegations of her son was not efficient and impartial. Accordingly, based on the materials before it, the Committee cannot conclude that the State party has failed to comply with its obligation to carry out a prompt, impartial and effective investigation into the allegations of torture of the complainant's son.

14. In the absence of further pertinent information on file, the Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the State party did not violate the rules set out in articles 12 and 13 of the Convention and that, in the light of the information submitted to the Committee, no finding of any violation of any other provision of the Convention can be made.

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[11] Communication No. 59/1996, *Blanco Abad* v. *Spain*, Views adopted on 14 May 1998, para. 8.2.

[12] See communication No. 257/2004, *Keremedchiev* v. *Bulgaria*, decision adopted on 11 November 2008, para. 9.4.